Supreme Court, U.S.
FILED
MAR 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COMPANHIA DE NAVEGACAO
LLOYD BRASILEIRO,

Petitioner,

vs.

ALLIED CHEMICAL INTERNATIONAL CORP.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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15 pp

Questions Presented

1. Whether an ocean carrier is liable for misdelivery of cargo when it authorized the release of cargo by foreign port authorities to a consignee without requiring production of the original order bill of lading.

2. Whether bags of caprolactam or pallets should be deemed packages for the purpose of the $500 per package limitation of "Cogsa" [46 U.S.C. 1304(5)].

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Statement of the Case	1
Reasons for Denying Certiorari	5
1. Petitioner has failed to show any conflict between the Circuits as to the carrier's obligation to ensure that the proper party receives goods under an order bill of lading	5
2. The Court of Appeals correctly upheld the District Court's finding that the parties did not intend the pallets to be packages	7
3. The Courts below correctly applied United States law	9
Conclusion	10

TABLE OF AUTHORITIES

CASES:	Page
Allied International American Eagle Trading Corp. v. S.S. "Yang Ming", 672 F.2d 1055 (2d Cir. 1982)	8
American & Far Eastern Trading Co. v. Sea-Land Services, Inc., 493 F. Supp. 125, aff. 678 F.2d 830 (9th Cir. 1982)	7
Anderson v. City of Bessemer City, 105 S. Ct. 1504, 84 L.Ed. 518 (1985)	7
Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdam, 759 F.2d 1006 (2d Cir. 1985)	7
Constable v. National Steamship Co., 154 U.S. 51 (1894)	5
David Crystal, Inc. v. Cunard Steamship Co., 339 F.2d 295 (2d Cir. 1964), cert. den. 380 U.S. 976 (1965)	6
Farrell Lines v. Highlands Insurance Co., 696 F.2d 28 (2d Cir. 1982)	5
Mitsui & Co. Ltd. et al v. American Export Lines, Inc., 636 F.2d 807 (2d Cir. 1981)	7
Morse Electro Products Co. v. S.S. Great Peace, 437 F. Supp. 474 (D.C.N.J. 1977)	6
The Cabo Villano, 14 F.2d 978, mod. 18 F.2d 220 (2d Cir. 1927)	6

Page

STATUTES:

The Carriage of Goods By Sea Act ("Cogsa"), 46 U.S.C. §1304(5) ..... i, 3

The Pomerene Act, 49 U.S.C. 81 et seq 5

CONVENTION:

1968 Brussels Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 8

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STATEMENT OF THE CASE

Respondent*, respectfully submits this Statement of the Case only to the extent necessary to correct inaccuracies and omissions in petitioner's statement.

Respondent, a shipper, instituted suit to recover money damages against petitioner, an ocean carrier, for breach of a contract

* Respondent Allied Chemical International Corp. was a wholly owned subsidiary of Allied Corporation. After judgment was entered in the District Court and while the appeal was pending in the Court of Appeals, Allied Corporation merged with the Signal Corp. and is now known as Allied-Signal Corp.

of carriage of goods or alternatively for conversion, both founded on a misdelivery of goods shipped from the United States by respondent on petitioner's vessel to a Brazilian consignee. The goods were sold on terms of sight draft against documents, including the original order bill of lading, forwarded by respondent to a local Brazilian bank for handling and collection. The documents were only to be delivered against payment of the sight draft.

Respondent contended that petitioner improperly caused the goods to be delivered to the consignee without requiring production of the original order bill of lading, as is required in overseas trade, thus enabling the consignee, who later became insolvent, to obtain possession of the goods without making payment therefor.

Petitioner, on the other hand, contended that it made a proper delivery of the goods under its contract of carriage with respondent when it made physical delivery to the Brazilian port authority charged with the responsbility for receiving goods from ocean carriers, and that it was the responsibility of the port authority to obtain the original bill of lading as prerequisite for giving possession to the consignee. Thus, petitioner argued, it was not liable for respondent's loss.

The Courts below both rejected petitioner's argument on the basis of undisputed evidence, not mentioned in the petition, that were it not for the issuance of a document called a "carta declaratoria" (in English "a letter of declaration") by petitioner's agent, the port authority would not have permitted the consignee to take possession of the goods (A-7, par. 6) (A-14, A-24)*. Under Brazilian import regulations, the carta declaratoria was an alternative to the bill of lading as an essential import document. Thus, by issuing the carta declaratoria to the consignee, the petitioner authorized the physical delivery of the goods by the port authority to the consignee without requiring the consignee to produce the original bill of lading.

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* Reference is to petitioner's Appendix.

It is therefore inaccurate for petitioner to say in its Statement of the Case (p. 3) that respondent contended that the letter was improperly used by the consignee to obtain possession of the shipment from the port authority without surrender of the bill of lading, when, the very purpose of the letter, or carta declaratoria, was to be a substitute for the bill of lading, as the record clearly showed. However, by issuing the carta declaratoria, and not requiring the bill, the petitioner acted at its peril. It was no longer relying on documents, but rather on the reputation and honesty, albeit misplaced, of the consignee's agent.

The remaining question raised below and in the petition involves the unpleaded partial defense of a $500 package limitation provided in petitioner's long-form bill of lading which incorporated the provisions of the Carriage of Goods by Sea Act ("Cogsa"), 46 U.S.C. §1304(5)*. Petitioner claims that the pallet was a package for the purpose of limiting respondent's recovery herein.

The District Court, however, found on the evidence presented that the parties intended each bag of caprolactam to be a package, rather than each pallet (A-8, par. 12). The Court further found that respondent declared the nature and value of the cargo in the bill of lading, and that there was no proof that petitioner offered a choice of rates in its tariff or otherwise for purposes of the package limitation (A-8, par. 13). Among the District Court's specific findings on this issue was that "Neither Lloyd's tariff nor its bill of lading provide for any additional freight in the event of a declaration of value in excess of $500 per package." (A-6, par. 21).

And yet, in its brief to the Court of Appeals, petitioner attempted to introduce new evidence to show that it offered a choice of rates to the shipper, but the Court of Appeals, alluding to that

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* The Court of Appeals bypassed the question of whether the failure to plead the limitation as a partial defense constituted a waiver as they agreed with respondent's contention that the pallet should not be considered to be the package and that the limitation was irrelevant.

attempt by petitioner, stated that they were limited to the record and sustained the District Court's finding that respondent had no option to pay a higher rate under the applicable tariff (A-28).

Petitioner here again seeks to introduce new evidence on the same issue when it states on Page 9 of the petition, Point 3, that an *ad valorum* freight bill of lading usually calls for additional freight if the shipper desires to be covered for a value in excess of $500 per package. This attempt by petitioner to inject new evidence into this case should once again be rejected.

The Court of Appeals, in ruling that the question of what constitutes a Cogsa package was in the first instance a matter of contract interpretation and ultimately a question of the parties' intentions, unanimously concluded that the District Court's findings as to the parties' intentions were not clearly erroneous and upheld its decision rejecting this partial defense.

Another point inaccurately stated by petitioner is that the Court of Appeals was critical of the District Court's opinion (sic), giving the impression that such criticism was on the merits. In fact, the criticism was only directed to the District Court's adoption, almost verbatim, of the respondent's findings of fact and conclusions of law and the Court of Appeals actually affirmed the District Court's decision in every respect. Furthermore, on a petition for rehearing and suggestion of a hearing *in banc*, not one Court of Appeals Judge requested that a vote be taken thereon (A-29).

Reasons For Denying Certiorari

1. *Petitioner has failed to show any conflict between the Circuits as to the carrier's obligation to ensure that the proper party receives goods under an order bill of lading.*

Petitioner contends that the decision of the Second Circuit runs counter to a line of decisions, including one of this Court, *Constable v. National Steamship Co.*, 154 U.S. 51, 63, holding in general terms that a carrier's responsibility ceases after delivery of cargo is made according to the custom and usage of the port, in this case, to a government port authority charged with the duty to receive cargo and to physically distribute it to the consignee.

These cases were distinguished in the Courts below from the case at bar because they all involved either cargo damage, shortages or physical loss or disappearance occurring while the goods were in the custody of the port authorities. Not one case involved the failure to produce an original bill of lading as required by the Pomerene Act, 49 U.S.C. 81, et seq., or the carrier's involvement in such failure. Although the District Court referred to the cited cases as being inapplicable (A-7, par. 9), the Court of Appeals apparently did not think it worthy of comment, notwithstanding that petitioner cited the Second Circuit's recent decision in *Farrell Lines v. Highlands Insurance Co.*, 696 F. 2d 28 (2d Cir. 1982) in its brief before that Court, as well as in its petition for rehearing.

More precisely, on the question of whether this Court should grant certiorari to resolve a conflict between Circuits, the petitioner has not cited a single case in another Circuit holding that an ocean carrier is not liable to a shipper when it does not require production of the original bill of lading as a condition for the release of cargo, or holding that a carrier is not liable when it issues a document to a foreign port authority which has the effect of releasing cargo without requiring surrender of the original bill of lading.

The single case which was the most in point and relied on by the Second Circuit is not mentioned or distinguished by the petitioner, *The Cabo Villano*, 14 F. 2d 978, mod. 18 F. 2d 220 (2d Cir. 1927). The Second Circuit there said that the defense of delivery in the usual manner to the Spanish Government did not relieve the carrier of liability because the Spanish Government made the ultimate delivery on the order of the carrier's agent, who relied on the fact that the person to whom the goods were released was a reliable and well-known person. There was no proof in that case that the carrier's agent was compelled under the laws, requirements or custom of the port to make the order for delivery as it did, nor was there proof in the instant case that petitioner's agent was compelled under the laws, requirements or customs of the port of Salvador to issue the carta declaratoria to the consignee's agent.

The critical factor in *The Cabo Villano* case and in the instant case is that the cargo was within the control of the carrier or its agents and that the misdelivery came about as a result of the carrier's voluntary act. See *Morse Electro Products Co. v. S.S. Great Peace*, 437 F. Supp. 474, 482 (D.C.N.J. 1977).

Petitioner further argues that the Court of Appeals relied erroneously on the case of *David Crystal, Inc. v. Cunard Steamship Co.*, 339 F.2d 295 (2d Cir. 1964), cert. den. 380 U.S. 976 (1965) because in that case the cargo was discharged into the hands of the carrier's independent stevedore whereas in the instant case, the goods had been delivered to a government agency. Once it is determined that an ocean carrier has a continuing responsibility, as carrier or bailee, to see that the proper person receives the goods and the carrier has some control over the disposition of the goods, it should make no difference who has physical possession of the goods. However, even on this point, petitioner has failed to cite a single case in conflict with the Second Circuit that makes a distinction between delivery to an independent stevedore as against delivery to a government agency.

Petitioner attempts to show a conflict between the Second and Fifth Circuits with respect to clause 12 of petitioner's bill of lading

which the Fifth Circuit upheld, but which the Second Circuit held to be null and void. Each Court, however, was applying the clause to a different set of facts. In the Fifth Circuit, it was applied to a case of a disappearing container which had been delivered by the carrier to the port authority and was lost through no fault of the carrier. In the instant case, it was applied to the active involvement of the carrier in authorizing the port authority to release cargo without calling for the surrender of the bill of lading. Conceivably, the clause could be valid for one purpose and invalid for another. Therefore, respondent submits that, on the different facts, the two Circuits are not in conflict on an important or novel question of federal law.

2. *The Court of Appeals correctly upheld the District Court's finding that the parties did not intend the pallets to be packages.*

In upholding the findings of the District Court that the parties did not intend the pallets to be packages, The Court of Appeals followed the clear direction of this Court in the recent case of *Anderson v. City of Bessemer City*, 105 S. Ct. 1504, 1511, 84L.Ed.2d 518, 527 (1985), that findings by the District Court cannot be disturbed unless, on the basis of the entire record, they are clearly erroneous. Since the Court of Appeals had the benefit of the complete record and showed that it fulfilled its reviewing responsibility, little need be said on this issue beyond what is set forth in the Court of Appeals opinion (A-25-28).

Petitioner's reason for certiorari on the package limitation issue is founded on a plea for uniformity in maritime law and foreign commerce*, but petitioner's view would have the opposite result. As noted in *Mitsui & Co. Ltd., et al. v. American Export Lines, Inc.*, 636 F.2d 807, 821 (2d Cir. 1981) and in *Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdam*, 759 F.2d 1006, 1013 (2d

* Petitioner incorrectly stated that this is the first case where a court has held a pallet not to be a package. It was so held in *American & Far Eastern Trading Co. v. Sea-Land Services, Inc.*, 493 F. Supp. 125, aff. 678 F.2d 830 (9th Cir. 1982).

Cir. 1985), the 1968 Brussels Protocol to Amend The International Convention for The Unification of Certain Rules of Law Relating to Bills of Lading* would provide in a case like the instant one, that the "article of transport," i.e. the pallet, shall not be deemed to be the package. This Protocol was signed by the United States, but not ratified, but the necessary number of countries signed it so as to come in effect in 1977. Thus, petitioner would have this Court adopt a hard and fast rule contrary to one already in use in many countries by law, an adoption which would be the antithesis of uniformity. The trend, if anything, appears to be the other way, towards the Protocol definition.

True, the Second Circuit in *Allied International American Eagle Trading Corp. v. S.S. "Yang Ming"*, 672 F.2d 1055 (2d Cir. 1982), was unwilling to abide only by the written notice in the bill of lading of the number of units on the pallets, if the bill elsewhere listed the number of pallets as the number of packages. But in the instant case, without the additional reference, the Second Circuit was constrained to give equal consideration to the fact that the number of pallets was listed once, as was the number of bags. If there was nothing more, the principle that ambiguities in contracts of adhesion must be resolved against the issuing carrier should have tipped the scales in favor of the shipper at that stage of the case. However, the Courts below further found that the shipper had declared the nature and value of the goods, that the freight rate was based on the value of the goods and that under the applicable tariff, respondent "had no option to pay a higher rate." Under those circumstances, the Court of Appeals properly said that "Allied could reasonably have expected to recover their value if they were lost. Similarly, having levied a

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*The Brussels Protocol provides in pertinent part as follows:

"...(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit."

rate keyed to value, Lloyd could reasonably have expected to be liable for that value. It would be illogical to ascribe a contrary intent to the parties." (A-28).

Respondent heretofore discussed the effort by petitioner to introduce new evidence in the appeal of the case and in its petition with respect to an alleged additional freight charge if the shipper desired coverage in excess of $500 per package, an attempt rejected by the Court of Appeals, and which should be rejected once again. Suffice it to say that not having a choice of rates, the cases cited by petitioner where a tariff provides for a choice of rates are inapposite.

3. *The Courts below correctly applied United States Law.*

Petitioner's contention with respect to applicability of Brazilian tort law was met head-on by the Court of Appeals (A-24) and need not be repeated. However, it should be noted that if petitioner's argument is accepted, respondent would be without a remedy, for petitioner contends that under Brazilian law, the carrier would not be liable either under contract or in tort. It is also evident that the Brazilian port authorities would also not be liable because they acted in accordance with their own import regulations which allowed them to accept a carta declaratoria from the ocean carrier, in place of the bill of lading. Such result would be disastrous to international trade and commerce.

CONCLUSION

For the foregoing reasons, respondent respectfully prays that the application for a writ of certiorari be denied.

Respectfully submitted,

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